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FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

2004 FEB -9 P 4: 31

**SENSITIVE**

MUR: 5275  
DATE COMPLAINT FILED: June 13, 2002

DATE OF NOTIFICATION: None  
DATE ACTIVATED: March 6, 2003

EXPIRATION OF STATUTE OF  
LIMITATIONS: May 17, 2007

COMPLAINANT: Friends of David Fink

RESPONDENT(S): Unknown

RELEVANT STATUTES  
AND REGULATIONS: 2 U.S.C. § 441d(a)  
2 U.S.C. § 431(18)  
2 U.S.C. § 438(a)(4)  
11 C.F.R. § 110.11  
11 C.F.R. § 100.17  
11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

**I. INTRODUCTION**

MUR 5275 arose from a complaint filed on June 19, 2002 by Gene A. Farber, counsel for Friends of David Fink (the "Fink Committee"). 2 U.S.C. § 437g(a)(1). The complaint alleged that unknown persons sent a letter to Mr. Fink's contributors and vendors that expressly advocated the defeat of Mr. Fink without a proper disclaimer in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Statement of Facts**

3 This matter involves activities that occurred in connection with the election held in  
4 Michigan's new 9<sup>th</sup> Congressional district in 2002.<sup>1</sup> David Fink was the Democratic candidate  
5 and ran unopposed in the primary election held on August 6, 2002. Incumbent Joe Knollenberg  
6 was the Republican candidate and won his contested primary election. Mr. Fink lost the general  
7 election against Mr. Knollenberg by eighteen percentage points.

8 During the primary campaign, on or about May 17, 2002, a one-page letter was sent from  
9 Royal Oak, Michigan to an unknown number of persons. Complaint at 3. The letter contained a  
10 copy of a May 12, 2002 The Detroit News & Free Press newspaper article titled, "Dems' hopes  
11 dim in House races." *Id.* The article stated that Mr. Fink's opponent would be Representative  
12 Knollenberg, "who spent \$1.1 million [in the 2000 election] and will not have a money problem  
13 this year." *Id.* The article also referenced the opinion of a Democratic political pollster who  
14 analyzed the new 9<sup>th</sup> Congressional district in Michigan and concluded that even if there were a  
15 large Democratic turnout, the Democratic base in that district would only be roughly 43 percent  
16 of the population. Following the article the sender added:

17 Dear Fellow David Fink Supporter,

18  
19 As the above article shows, David's race is virtually impossible to win even if he spends millions of his  
20 own money. Ed Sarpoulus, the political guru quoted is a Democrat! David is a special person and will  
21 have his time. Especially at a time like this, however with all the problems in the Middle East, our  
22 community needs to put its resources behind candidates who can win like the Levin brothers and others.  
23 We will be redirecting our political contributions to races that can win and will ensure a strong pro-Israel  
24 voice in Congress and in Lansing. We urge everyone to do the same.

25  
26 Former David Fink Supporter

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<sup>1</sup> All of the facts recounted in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act are prior to the effective date of BCRA and all citations to the Commission's regulations are to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

1 *Id.*<sup>2</sup> The letter did not bear any disclaimer or any identifying information such as a return  
2 address or signature that would allow a recipient to determine who sent it.

3 Along with the letter, the complainant included copies of 41 envelopes that allegedly  
4 carried the letter to 37 persons.<sup>3</sup> Complaint at 4-18. Of these, none included a return address,  
5 but it appears from the legible “Royal Oak, Michigan, May 17, 2002” postmarks, identical First  
6 Class stamps, and similar addressing, fonts and style, that they were from the same mailing.

7 The complainant alleges that the letter may have been sent to “all contributors and  
8 vendors” of the Fink Committee at that time because the letter was addressed to certain vendors  
9 who were not contributors and the names and addresses on the envelopes matched the names and  
10 addresses of the vendors listed in “the report” filed by the Fink Committee with the Commission.  
11 Complaint at 1. The Fink Committee reported receiving contributions from 479 individuals and  
12 19 PACS before March 31, 2002.<sup>4</sup> *See* Attachment 1 at 1. The Fink Committee also itemized  
13 expenditures to 42 vendors made before March 31, 2002. *Id.* at 2-5. Thus, using the  
14 complainant’s assumption, that all itemized contributors and vendors of the Fink Committee  
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<sup>2</sup> The reference in the letter to the “Levin brothers” presumably referred to Democratic incumbents Michigan Senator Carl Levin, and Michigan’s 12<sup>th</sup> district Representative Sander Levin, who were both up for reelection in 2002.

<sup>3</sup> The complaint included two different envelopes for Karen Resnick, Richard Kaufman, Mark Rottenberg, and Mark Kleiman, presumably because each received the letter twice. *See* Complaint at 6, 7, 9, 17-18.

<sup>4</sup> Two of the envelopes appear to use the nicknames of the addressees rather than the names on the Fink Committee’s disclosure reports. One envelope is addressed to a “Babe” Fink, while the contributor list only shows a contribution from a “Bertha” Fink, and a second envelope is addressed to an “Edie” Resnick, but the only similar contribution is from an “Edith” Resnick.

1 received the letter, the total number of letters sent without a disclaimer would not exceed 540.<sup>5</sup>

2 **B. Legal Analysis**

3 Pursuant to 2 U.S.C. § 441d(a), “whenever any person makes an expenditure for the  
4 purpose of financing a communication expressly advocating the election or defeat of a clearly  
5 identified candidate,” such communication must include a disclaimer clearly stating the name of  
6 the person who paid for the communication and indicating whether the communication was  
7 authorized by any candidate or candidate's authorized committee. 2 U.S.C. §§ 441d(a),  
8 431(8)(a); *see also* 11 C.F.R. § 110.11. Expressly advocating means “any communication that –  
9 (a) Uses phrases . . . which in context can have no other reasonable meaning than to urge the  
10 election or defeat of one or more clearly identified candidate(s).”<sup>6</sup> 11 C.F.R. § 110.11(a)(1).  
11 Soliciting of financial support for a candidate has long been viewed as express advocacy of the  
12 candidate’s election. *See, e.g., FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 61-62 (D.D.C.  
13 1999) (reasoning that exhorting one to contribute to a clearly identified candidate is express  
14 advocacy). It therefore stands to reason that a communication that explicitly exhorts its audience  
15 not to financially support a candidate, or to withdraw support already given, expressly advocates  
16 the candidate’s defeat. In this case, the letter contained phrases or an explicit directive not to  
17 financially support Mr. Fink; it “urge[d] everyone” to “redirect” political contributions from Fink  
18 to candidates in “races that can win.” Complaint at 3.

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<sup>5</sup> The number may have actually been somewhat less than 540. While there were 42 vendors listed in the Fink Committee’s Reports, only two envelopes to vendors were included with the complaint, one to “Gene A. Farber” and another to “Fink, Zausmer, Kaufman, Inc.” See Complaint at 8, 12. This Office thinks it is unlikely that a person attempting to influence campaign contributions would send the letter to all of the vendors, such as “AT&T,” “Office Max,” or “Postmaster.” See Attachment 1 at 2-5. Further, the impact of the mailing appears to have been limited in a second respect. For instance, even after Mr. Farber received the letter, he still made two contributions for the primary election, one on June 27, 2002 and the other on August 6, 2002, and 26 of the 37 confirmed individuals who received the letter had already contributed the maximum to Mr. Fink’s primary election.

<sup>6</sup> The letter referred to a “clearly identified candidate” because the name of the candidate appeared in the communication. 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

1 For the reasons discussed above, since the letter appears to contain express advocacy  
2 relating to a clearly identified candidate, section 441d(a) required that the persons financing the  
3 letter include a disclaimer in a clear and conspicuous manner stating clearly who paid for the  
4 communication and whether it was authorized by any candidate or candidate committee. *See*  
5 11 C.F.R. § 110.11(a)(5). They failed to do so. Therefore, this Office recommends that the  
6 Commission find reason to believe that unknown respondents violated 2 U.S.C. § 441d(a).

7 There is also an issue of whether unknown respondents may have violated 2 U.S.C.  
8 § 438(a)(4) by taking contributor information listed in the Committee's disclosure report, as  
9 alleged by the complainant, and using it to distribute their letter. This provision prohibits the use  
10 of information copied from reports filed with the Commission "for the purpose of soliciting  
11 contributions." 2 U.S.C. § 438(a)(4). Just as a communication exhorting its audience to  
12 withdraw financial support from a candidate and direct it elsewhere constitutes express  
13 advocacy, *see* discussion *supra*, a communication exhorting a redirection of political  
14 contributions from Fink to candidates "in races that can win" constitutes a solicitation of  
15 contributions to candidates other than Fink. *See also* AO 2003-24 (stating that section 438(a)(4)  
16 is "a broad prophylactic measure intended to protect the privacy of the contributors about whom  
17 information is disclosed in FEC public records").<sup>7</sup> Therefore, this Office recommends that the  
18 Commission find reason to believe that unknown respondents violated 2 U.S.C. § 438(a)(4).

19 **III. CONCLUSION**

20 Notwithstanding the importance of the disclaimer requirement and the restriction on the  
21 use of contributor information, this Office does not believe that attempting to pursue this case  
22 further would be a constructive use of limited Commission resources. First, an investigation to

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<sup>7</sup> Additionally, the letter might involve the failure to report an independent expenditure, though this cannot be confirmed without additional information. *See* 2 U.S.C. §§ 434(b)(6)(B)(iii), 434(c).

1 ascertain the identity of the person(s) responsible for the creation, funding, and distribution of the  
2 letter would be difficult and possibly protracted, since there appear to be no leads other than the  
3 content of the letter, the postmark location, and the Fink Committee. Thus, even an investigation  
4 lasting many months may not yield such positive identification. Second, although the total  
5 number of letters sent is unknown, the scope of the activity appears modest and the mailing took  
6 place a full three months before the uncontested August primary election. Third, while the  
7 mailing in this case may fall under the pre-BCRA requirement for disclaimers on direct mailings  
8 exceeding 100 pieces, the post-BCRA disclaimer requirement of 500 pieces further suggests that  
9 exercising prosecutorial discretion is appropriate. *See* footnote 5, *supra*. In light of these factors  
10 and the likely *de minimis* impact the letter had on the ultimate outcome of the election, this  
11 Office recommends that the Commission take no further action and close the file.

12 **IV. RECOMMENDATIONS**

- 13 1. Find reason to believe that unknown persons violated 2 U.S.C. § 441d(a).
- 14 2. Find reason to believe that unknown persons violated 2 U.S.C. § 438(a)(4).
- 15 3. Approve the appropriate letter to the complainant.
- 16 4. Close the file.

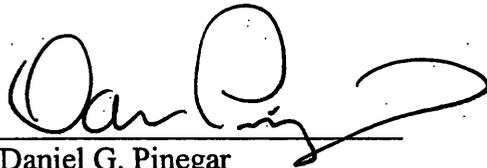
22 Lawrence H. Norton  
23 General Counsel

25 Rhonda J. Vosdingh  
26 Associate General Counsel  
27 for Enforcement

29 2/9/04  
30  
31 Date

BY: Susan L. Lebeaux  
Susan L. Lebeaux  
Assistant General Counsel

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Daniel G. Pinegar  
Attorney

Attachment:

1. Fink Committee Chart (Non-Individual Contributors & Vendors)

**Friends of David Fink**  
**Contributions from Other Political Committees/PACs,**  
**7-1-01 through 3-31-02**

Name	Date of Contribution	Amount	Election Designation
Association of Trial Lawyers	12/12/01	\$ 5,000.00	Primary
Association of Trial Lawyers	3/27/02	\$ 5,000.00	General
Barney Frank for Congress Cmte.	3/28/02	\$ 1,000.00	Primary
Brady Voter Education Fund	3/21/02	\$ 1,000.00	Primary
Cmte for a Democratic Future	3/29/02	\$ 1,000.00	Primary
Cmte for Leadership and Progress	3/31/02	\$ 1,000.00	Primary
DCCC	1/15/02	\$ 250.00	Primary
DCCC	3/31/02	\$ 1,000.00	Primary
Friends of Richard Kitch	11/21/01	\$ 150.00	Primary
Frumin 2000 Cmte	12/21/01	\$ 500.00	Primary
Jaffe, Raitt, Meuer & Weiss PAC	3/27/02	\$ 500.00	Primary
Laborers Political League	3/28/02	\$ 1,000.00	Primary
Lewis & Munday, PC	3/29/02	\$ 250.00	Primary
Michigan Democratic State Central Cmte.	12/21/01	\$ 5,000.00	Primary
Michigan Independent PAC	11/10/01	\$ 5,000.00	Primary
Planned Parenthood Action fund, Inc. PAC	3/27/02	\$ 1,000.00	Primary
Rangel for Congress	3/28/02	\$ 1,000.00	Primary
Stabenow for US Senate	3/29/02	\$ 1,000.00	Primary
Stabenow for US Senate	3/29/02	\$ 1,000.00	General
Strobi, Cunningham, Caretti & Sharp PAC	11/20/01	\$ 150.00	Primary
Sue Hall for Mayor Cmte.	12/15/01	\$ 100.00	Primary

**Friends of David Fink  
Vendor Listing, 7-1-01 through 3-31-02**

Vendor	Date of Disbursement	Purpose
Ameritech	11/7/01	telephone
Ameritech	12/5/01	telephone
Ameritech	1/22/02	telephone
Ameritech	1/22/01	telephone
Ameritech	2/25/02	telephone
Appel, Jeffrey	3/25/02	event catering expenses
AT&T	1/2/02	telephone
AT&T	1/22/02	telephone
AT&T	2/25/02	telephone
Bidlack Creative Services	7/25/01	graphic design
Bidlack Creative Services	9/8/01	graphic design
Bidlack Creative Services	2/25/02	graphic design
Bidlack Creative Services	2/25/02	graphic design
Bidlack Creative Services	2/25/02	graphic design
Bidlack Creative Services	2/25/02	graphic design
Bidlack Creative Services	2/25/02	graphic design
Bidlack Creative Services	2/25/02	graphic design
Brookes Printing Company	10/31/01	printing
Brookes Printing Company	11/7/01	printing
Brookes Printing Company	11/19/01	printing
Brookes Printing Company	11/21/01	printing
DCCC	1/15/02	research materials
Farber, Gene A.	9/21/01	postage reimbursement
Farber, Gene A.	9/21/01	postage reimbursement
Farber, Gene A.	11/6/01	office supply reimbursement
Farber, Gene A.	11/6/01	office supply reimbursement
Farber, Gene A.	11/6/01	office supply reimbursement
Farber, Gene A.	11/6/01	office supply reimbursement
Farber, Gene A.	12/5/01	meal expense reimbursement
Farber, Gene A.	12/5/01	office supply reimbursement
Farber, Gene A.	12/28/01	materials reimbursement
Farber, Gene A.	12/28/01	materials reimbursement
Farber, Gene A.	1/2/02	materials reimbursement
Farber, Gene A.	1/2/02	materials reimbursement
Farber, Gene A.	1/2/02	materials reimbursement
Farber, Gene A.	1/22/02	postage reimbursement
Farber, Gene A.	1/22/02	meal expense reimbursement
Farber, Gene A.	2/25/02	office supply reimbursement
Farber, Gene A.	2/25/02	office supply reimbursement
Feldman, Eric	2/14/02	mileage reimbursement

Feldman, Eric	2/14/02	mileage reimbursement
Feldman, Eric	3/27/02	mileage reimbursement
Feldman, Eric	3/27/02	mileage reimbursement
Feldman, Eric	3/27/03	mileage reimbursement
Feldman, Eric	3/27/02	materials reimbursement
Fink, Zausmer, Kaufman, Inc.	12/28/01	office supplies
Fink, Zausmer, Kaufman, Inc.	12/28/01	cell phone reimbursement
Fink, Zausmer, Kaufman, Inc.	8/20/01	rent
Fink, Zausmer, Kaufman, Inc.	8/20/01	rent
Fink, Zausmer, Kaufman, Inc.	9/21/01	office supplies
Fink, Zausmer, Kaufman, Inc.	9/21/01	office supplies
Fink, Zausmer, Kaufman, Inc.	9/21/01	office supplies
Fink, Zausmer, Kaufman, Inc.	9/21/01	office supplies
Fink, Zausmer, Kaufman, Inc.	10/1/01	rent
Fink, Zausmer, Kaufman, Inc.	11/9/01	office printing/expenses
Fink, Zausmer, Kaufman, Inc.	11/6/01	rent
Fink, Zausmer, Kaufman, Inc.	2/27/02	printing expense
Fink, Zausmer, Kaufman, Inc.	2/27/02	mileage/parking expense
Fink, Zausmer, Kaufman, Inc.	2/27/02	printing expense
Freeman, Daniel	8/31/01	salary
Friedman, Marcia	1/23/02	office supplies reimbursement
Friedman, Marcia	1/23/02	office supplies reimbursement
Glenn Triest Photographic	7/31/01	photographic services
Glenn Triest Photographic	12/5/01	photographic services
Goodman, Barry	3/25/02	event catering expenses
Goodman, Nicole	3/25/02	event catering expenses
Grossman, Barbara	12/5/01	fundraiser supplies reimbursement
Grossman, Barbara	12/5/01	event expense reimbursement
Grossman, Barbara	2/25/02	supplies reimbursement
Grossman, Barbara	2/25/02	supplies reimbursement
Hermeling, Doreen	1/2/02	event catering expenses
Identity Marketing & PR	2/25/02	public relations consulting
Identity Marketing & PR	2/25/02	public relations consulting
Internet Holdings Company	1/22/02	computer services
Internet Holdings Company	2/25/02	computer services
Kay Britten Communications	1/7/02	communications services
Kelly, Michael	8/17/01	office supplies reimbursement
Kelly, Michael	8/17/01	office supplies reimbursement
Kelly, Michael	8/31/01	salary
Kelly, Michael	8/31/01	salary
Kepes, Richard B.	3/25/02	event catering expenses
Kieloch Consulting, Inc.	3/8/02	fundraising consulting services
Kinko's	11/23/01	printing expense
Kinko's	2/25/02	printing expense

Michigan National Bank	8/2/01	materials charge
Michigan National Bank	8/9/01	service charge
Michigan National Bank	8/31/01	payroll taxes
Michigan National Bank	9/13/01	materials charge refund
Michigan National Bank	10/31/01	materials charge
NGP Software, Inc.	7/20/01	software
NGP Software, Inc.	8/20/01	software
NGP Software, Inc.	8/20/01	software
NGP Software, Inc.	9/21/01	software
NGP Software, Inc.	9/21/01	software
NGP Software, Inc.	9/21/01	software
NGP Software, Inc.	11/6/01	software
Office Max	2/25/02	office supplies
Office Max	3/27/02	materials
Office Star, LLC	8/20/01	office supplies
Office Star, LLC	8/20/01	office supplies
Office Star, LLC	8/20/01	office supplies
Office Star, LLC	8/20/01	office supplies
Office Star, LLC	9/21/01	office supplies
Office Star, LLC	9/21/01	office supplies
Office Star, LLC	10/1/01	office supplies
Paychex	1/10/02	payroll
Paychex	2/11/02	payroll
Paychex	3/11/02	payroll
Postmaster	8/1/01	postage
Postmaster	8/10/01	postage
Postmaster	8/21/01	postage
Postmaster	8/23/01	postage
Postmaster	8/30/01	postage
Postmaster	8/30/01	postage
Postmaster	8/31/01	postage
Postmaster	8/31/01	postage
Postmaster	11/23/01	postage
Postmaster	2/22/02	postage
Postmaster	2/11/02	postage
Postmaster	1/22/02	postage
Postmaster	2/25/02	postage
Postmaster	2/25/02	postage
Rillinger, Robert S.	12/14/01	fundraiser catering reimbursement
Rothstein, J. Adam	1/22/02	refund excess contribution
Saulco Solutions, LTD	12/5/01	office equipment
Scheltenbrand Printing Co.	9/21/01	printing expense
Sharfman, Saul	7/20/01	office equipment
Sharfman, Valerie	3/23/02	office equipment



**MUR 5275**

**Theorized Impact of "Letter" on Fink Committee Fundraising**

Est. Number of Letters sent (total): 540

Est. Number of Letters sent (individuals): 479

**Fundraising:**

Primary fundraising (prior to Letter, 3/31/02)	\$366,901 (2001)/\$351,001 (Ind.) \$200,821 (April)/\$185,822 (Ind.) =\$567,722/\$536,823
Primary fundraising (after Letter, 9/30/02)	\$333,024 (thru Oct.)/\$210,038 (Ind.)
Primary fundraising (TOTAL)	\$900,746/\$746,861 (Ind.)
Fundraising total (as of Pre-General, 10/16/02)	\$937,921 (Ind.)

**Individuals:**

Number of Contributors Pre-Letter	Number who Contributed Maximum (Primary)	Number who Contributed Maximum (Primary & General)	Number who Contributed Post-Letter (Primary)	Number who Contributed Post-Letter (Primary & General)
37 (on envelopes)	26 (on envelopes)	Unk.	1 (on envelopes)	1 (on envelopes)
479	270	Unk.	38	506

Number of New Contributors Post-Letter
468